

1 THE HONORABLE RICARDO S. MARTINEZ

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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Petitioner,

12 vs.

13 MICROSOFT CORPORATION, et al.,

14 Respondents.  
15

NO. 2:15-cv-00102 RSM

DECLARATION OF JAMES M.  
O'BRIEN

16  
17 I, James M. O'Brien, pursuant to 28 U.S.C. § 1746, declare as follows:

18 1. I am a partner in the law firm of Baker & McKenzie LLP and have practiced  
19 with the Firm in the areas of tax controversy, transfer pricing and international tax since 1981.  
20 I have represented Microsoft Corporation ("Microsoft") in U.S. income tax audits and  
21 controversies since 1994. I hold a Bachelor of Arts degree in Government from the University  
22 of Notre Dame and a Juris Doctor degree from the Harvard Law School.

23 2. I have represented Microsoft in the Internal Revenue Service ("IRS") audits of  
24 Microsoft's 1990-1991, 1992-1994, 1995-1996, 1997-1999, 2000-2003 and 2004-2006 tax  
25 years.

DECLARATION OF JAMES M. O'BRIEN - 1

Case No.: 2:15-cv-00102 RSM

LAW OFFICES  
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1           3.       The summonses at issue in this case relate to the 2004-2006 audit cycle, which  
2 commenced in January, 2007. The principal issues in dispute between Microsoft and the IRS  
3 are the determination of arm's length buy-ins under 26 U.S.C. § 482 and 26 C.F.R. § 1.482A-  
4 7(a) transfer prices under 26 U.S.C. § 482 with respect to software products purchased by  
5 Microsoft from one of the cost sharing participants.

6           4.       On May 19, 2014, the IRS engaged the civil litigation law firm of Quinn  
7 Emanuel Urquhart & Sullivan LLP ("Quinn Emanuel") to provide services in connection with  
8 this audit (the "IRS-Quinn Emanuel Contract").

9           5.       I first learned of the IRS-Quinn Emanuel Contract in late August, 2014.

10          6.       To the best of my knowledge and belief, the IRS-Quinn Emanuel Contract  
11 represents the first time that the IRS has retained private civil litigators in a U.S. income tax  
12 audit.

13          7.       Approximately one month after engaging Quinn Emanuel, the Treasury  
14 Department amended, without prior notice and comment, 26 C.F.R. § 301.7602-1(b) by adding  
15 a new third subparagraph as a temporary and proposed regulation, 26 C.F.R. § 301.7602-  
16 IT(b)(3), on June 17, 2014. The new subparagraph would allow third-party contractors  
17 engaged by the IRS to "participate fully in the interview of the witness summoned by the IRS  
18 to provide testimony under oath" on or after June 18, 2014, which the temporary regulation  
19 describes as including the contractor's interrogating the witness "in the presence and under the  
20 guidance of" an IRS officer or employee.

21          8.       Attached and marked as Exhibit A is a true and complete copy of a comment  
22 letter to John Koskinen, the Commissioner of the IRS, by Andrius R. Kontrimas, Chair, Tax  
23 Section of the State of Texas, dated September 16, 2014. Upon information and belief, this  
24 was the only comment letter submitted to the IRS on the June 19, 2014 temporary and  
25 proposed regulations under 7602.

1           9.       On September 22, 2014, Microsoft filed a Freedom of Information Act  
2 (“FOIA”) request for the IRS-Quinn Emanuel Contract, Contract No. TIRNE-14-C-00013, and  
3 related documents. Attached and marked as Exhibit B is a true and correct copy of Microsoft’s  
4 September 22, 2014 FOIA request.

5           10.      The IRS did not produce any documents in response to Microsoft’s September  
6 22, 2014 FOIA request.

7           11.      On November 26, 2014, I received a letter from Eli Hoory, Special Projects  
8 Deputy, IRS Transfer Pricing Operations, indicating that the IRS intended to allow its  
9 contractors, including Quinn Emanuel, to “participate fully” in the taking of testimony pursuant  
10 to the eight testimonial summonses at issue before the Court in *United States v. Mundie*, No.  
11 2:14-cv-00102-RSM. Attached and marked as Exhibit C is a true and correct copy of Mr.  
12 Hoory’s November 26, 2014 letter.

13           12.      In connection with a FOIA lawsuit filed on November 24, 2014, *Microsoft*  
14 *Corporation v. Internal Revenue Service*, No. 1:14-cv-01982 (D.D.C.), the Department of  
15 Justice produced a complete copy of the IRS-Quinn Emanuel Contract on January 14, 2015.  
16 Attached and marked as Exhibit D is a true and correct copy of the IRS-Quinn Emanuel  
17 Contract.

18                   (a)     The IRS-Quinn Emanuel Contract identifies the “Key Personnel”  
19 providing services under the contract, their expected billable hours and billing rates:

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1		<u>Key Personnel</u>	<u>Estimated Hours</u>	<u>Billing Rate</u>
2	Partner (Key	John Quinn	200	\$1,120
3	Expert/Contractor 1)			
4	Partner (Key	John Gordon	300	\$1,075
5	Expert/Contractor 2)			
6	Partner	Jeremy Andersen	400	\$ 840
7	Associates	Noah Helpern	700	\$ 670
8		Ryan Keech	800	\$ 555
9	Paralegal	Carol O'Connor	400	\$ 300

Exhibit D at Microsoft-FOIA-00171, Microsoft-FOIA-00195.

(b) The IRS-Quinn Emanuel Contract describes the Key Personnel as “highly skilled commercial litigation attorneys with extensive complex litigation experience evaluating, preparing and presenting cases dealing with multifaceted facts, complex economics and multiple legal issues.” Exhibit D at Microsoft-FOIA-00174. The IRS-Quinn Emanuel Contract also purports to address ethical conflict issues arising from Quinn Emanuel’s representation of the IRS and other clients. Ex. D at Microsoft-FOIA-00210-00212.

(c) During the audit, the IRS-Quinn Emanuel Contract envisions Quinn Emanuel providing two types of services: “Evaluation Services” and “Case Support Services.” The Evaluation Services are described as the “Key Personnel’s findings, assessment, and recommendations with respect to the factual and legal state of the case, identifying strengths, weakness, and areas for further development.” Exhibit D at Microsoft-FOIA-00176. The Case Support Services are described as the Contractor supporting “continued development, analysis, evaluation, and preparation of the issues under examination.” Such services include “preparing, organizing and presenting the factual record and legal analysis of the case,” “identifying and preparing new document requests, preparing for or participating in interviews[.]” Exhibit D at Microsoft-FOIA-00177.

1 (d) The IRS-Quinn Emanuel Contract describes the “Period of  
2 Performance” as follows:

3 The period of performance of this Contract begins on the  
4 execution date of this Contract and expires in accordance with  
5 this Contract based on the date of settlement and/or final  
6 disposition of the taxpayer case Period of Performance **Date of**  
7 **Award** through **12/31/16**. Although all four phases are non-  
8 severable, it is the unilateral right of the government to exercise  
9 option phases in accordance with contract terms. The period of  
performance is dependent on the litigation schedule of the  
government, the Court’s scheduling order, Settlement and/or  
final disposition of the Taxpayer case, not to exceed five years,  
whichever is later.

10 Exhibit D at Microsoft-FOIA-00191 (emphasis in original). The penultimate sentence of this  
11 contractual provision references “four phases” to Quinn Emanuel’s services. The last sentence  
12 of this contractual provision envisions Quinn Emanuel providing “expert witness” services up  
13 to, if not into, litigation. In connection with the litigation, the contract envisions one or more  
14 of the Key Personnel becoming “special government employees,” presumably at governmental  
15 salaries rather than their normal billing rates. Exhibit D at Microsoft-FOIA-00212.

16 13. On the same day that the Department of Justice produced the IRS-Quinn  
17 Emanuel Contract, it also produced a modification to the IRS-Quinn Emanuel Contract, dated  
18 October 28, 2014 (the “IRS-Quinn Emanuel Contract Modification”). Attached and marked as  
19 Exhibit E is a true and correct copy of the IRS-Quinn Emanuel Contract Modification.

20 14. Under the IRS-Quinn Emanuel Contract Modification, John Gordon, John  
21 Quinn, Jeremy Anderson, Noah Helpen, Jack Baumann, and Carol O’Connor, all of Quinn  
22 Emanuel, were provided with “[s]ix (6) Government owned laptops with USB Air Cards, at no  
23 cost to the vendor . . . for the duration of the contract.” Exhibit E at 002.

24 15. Following the IRS’s service of the “designated” and “related” summonses,  
25 Microsoft filed several additional FOIA requests. Exhibit F is a true and correct copy of a

1 FOIA request dated December 12, 2014, seeking documents regarding 26 C.F.R. § 301-7602-  
2 1T(b)(3). Exhibit G is a true and correct copy of Microsoft's FOIA request, also dated  
3 December 12, 2014 seeking documents in specific IRS employees and specific third-party  
4 contractors' files relating to 26 C.F.R. § 301.7601-1T(b)(3). The IRS has produced no  
5 documents responsive to these FOIA requests.

6 16. On March 11, 2015, Microsoft filed a second FOIA lawsuit, in this Court,  
7 seeking documents that are the subject of the FOIA requests described above in paragraph 11.  
8 *Microsoft Corp. v. IRS*, No. 2:15-cv-00369-RSM.

9 17. On March 12, 2015, Microsoft filed an additional FOIA request. Attached and  
10 marked as Exhibit H is a true and correct copy of a FOIA request dated March 12, 2015,  
11 seeking, *inter alia*, written communications and documents exchanged between the IRS and  
12 Quinn Emanuel, and associated documents created under the IRS's contract with Quinn  
13 Emanuel. The IRS has produced no documents responsive to this request.

14 I declare under penalty of perjury that the foregoing is true and correct.

15 Executed on this 18th day of March, 2015.

16 JAMES M. O'BRIEN  
17 By /s/ James M. O'Brien

18 Baker & McKenzie LLP  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Amy Matchison, Jeremy N. Henson, Noreene C. Stehlik and the U.S. Department of Justice; Daniel A. Rosen, James M. O'Brien and Baker & McKenzie LLP; Robert B. Mitchell, Hugh Frederick Bangasser and K&L Gates LLP; George E. Greer and Orrick Herrington & Sutcliffe; Stephen M. Rummage and Davis Wright Tremaine, and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants: N/A.

s/ D. Yvette Chambers

D. Yvette Chambers